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legal order. The balance found is fragile to both ends, legally because the notion of minimum harmonisation is so opaque, politically because the Member States have thought through the Commission's schemes.

The side-by-side of the two concepts on consumer law under the minimum standards rule allows the Member States to maintain and to defend their particular legal cultures and traditions.[15] Consumer contract law might be a prominent field to study what is behind the standard formula of the Member States legal cultures and traditions, in which areas national legal cultures are converging[16] or where they do and should not converge to maintain and safeguard cultural diversity. The origins of the European consumer law may be found in the French and to some extent in the Belgian legal system.[17] These early attempts had to be brought into line with the growing influence of the common law system on consumer law and the quite unsettled position of the Germanic legal system.

3. The Emerging EC Principle of Justice – The Legitimate Expectations of Consumers

National consumer *protection* law is linked to a welfarist vision of the nation state.[18] The raise of consumer protection in the Member States is inherently bound to the changed patterns of statutory responsibilities. Private law has remained largely outside the sphere of statutory influence. Contract law and contract making has been left to the parties alone. The agreement of the parties, the rights and duties as defined in the light of their autonomy is said to guarantee a 'just' result. Consumer contract law changed the patterns of responsibilities. Now the nation state has been made responsible to implement standards of justice in contractual relations. Justice is no longer or no longer alone in the hands of the parties, the state has become the invisible third in contractual relations who set the standards, at least in consumer contract law.

European consumer law being understood as market behaviour law is different. The European Community is not a state, at the very best a quasi state.[19] It bears no responsibility of the well-being of its citizens, it has no option between a social welfare state and a more liberal open market state. The overall emphasis has always led on market integration. It is in the light of the Single European Act that the European Community has been granted powers in social regulation. The inherent link of European consumer law, though being an integral part of the European Community's social outlook, is highlighted in the development of a genuine European concept of justice. The notion of legitimate expectations as the European concept of social justice has been developed elsewhere.[20] The European concept of justice is based on 'rights', consumer rights and supplier rights. These rights have to be balanced in an open process. Neither party can enforce its own rights, rights are enforceable only as far they are legitimate.

4. Law and Enforcement

The European Community is built on the concept of 'Vollzugs-Förderalismus' [21] – enforcement federalism. Member States are and remain free to decide how and by which legal means they ensure the enforcement of European law. Consumer law might well be taken as an example that the contrary is true. Most of the consumer contract law directives do not only provide for substantive rules meant to strengthen the legal position of the consumer, but also impose obligations on the Member States to secure adequate and effective enforcement. The European Court of Justice has considerably contributed to enhance the importance of enforcement through its concept of enforceable rights by appropriate remedies.

The deeper reason for this development must be found in the particular character of the market behaviour law. 'Rights' that provide a fair chance to get justice require appropriate remedies. Otherwise the concept of rights might end up in a deadlock and with it the whole conception of European consumer law as market behaviour law. Without adequate and effective enforcement rules, maybe even without European remedies, European consumer law may lose its character as 'law' being downgraded to a policy programme. It is one of the most amazing developments in European consumer law how the European Court of Justice gives shapes to consumer rights and remedies.[22] Therefore the traditional distinction between substantive law (materielles Recht) and the rules of procedure (Verfahrensrecht) does not work in the field of Community consumer law. Only a joint approach which combines substantive consumer law and the rules of procedure matches the particularities of the European private legal order.

III. In Sum – Securing the Consumer Input

The European Consumer Law Group demands participation in the ongoing work on the furtherance of European Contract Law. The European Consumer Law Group is convinced it is able to make a major contribution in the wider frame of the Communication on European Contract Law, more closely in the elaboration of an appropriate set of common principles on European consumer law rules, which might one day become a true European Code on Consumer Law alongside a European Code of European Contract Law or as an integral part of such a unified body of private law. ■

A Plea for Diversity in European Contract Law

*Jan Smits**

My main tenet is that a proper perspective on the future of European contract law cannot consist of a 'generalizing approach', such as the formulation and enactment of principles of European contract law. The future of contract law in Europe lies in recognizing tendencies of *divergence* in the law of contract, rather than in enacting general abstractions. This idea can be substantiated by presenting a general view of the need for harmonisation in Europe (1), by looking at the present state of affairs in European contract law (2) and by indicating what this means for the discussion on the European Commission's Communication (3).

In the first place, I like to emphasise that I do not see an economic motive for unification or harmonisation of private law as long as it is not entirely clear that the present diversity hampers commerce within Europe. I would like to see empirical data before such a conclusion can be drawn. The reactions on the Communication on European Contract Law are in this respect insightful: many of the reactions of

15 *Th. Wilhelmsson*, Private Law in the EU: Harmonised or Fragmented Europeanization, ERPL 2002, 77.

16 See on the notion of legal culture and traditions, *F. Wieacker*, Foundation of European Legal Cultures, (1990) 38 American Journal of Comparative Law (AJCL), 1 ff.; *H. Collins*, European Private Law and the Cultural Identity of States, (1995) 3 European Review of Private Law (ERPL), 353 ff.; *P. Legrand*, European Legal Systems are not converging, (1996) 45 International Comparative Law Quarterly (ICLQ), 52 ff.; *same author*, Against a European Civil Code, (1997) 60 Modern Law Review (MLR), 44 ff; in a broader perspective *V. Gessner, A. Höland, C. Varga*, European Legal Cultures, Tempus Series, Dartmouth, 1996

17 See *H.-W. Micklitz*, book review of F. Osman (ed.), Vers un Code de la Consommation, 1998, RabelsZ 65 (2001) 566-575.

18 See the series on 'Consumer Protection Law' edited by *Norbert Reich*, van Nostrand Reynolds Company, 1980-1981.

19 *H.-W. Micklitz/St. Weatherill*, European Economic Law, 1996.

20 *H.-W. Micklitz*, Social Justice in European Private Law, Yearbook of European Law 1999/2000, 167-204.

21 *J.A. Frowein*, Integration and the Federal Experience in German and Switzerland, in M. Cappelletti/M. Seccombe/J.H.H. Weiler (eds.), Integration through Law, 1986, 586, 587.

22 It suffice to refer to *Leitner*, ECJ, 12.3.2002, Case C-168/00 – *Leitner v. TUI Deutschland* (ECR) 2002, nyr.

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commerce and industry are rather against than in favour of harmonisation of contract law. And even if these data can be provided, the question remains whether the costs of harmonisation are not far bigger than the costs of present diversity, leave alone other arguments against unification of law that can be derived from 'postmodern' thought.

In the second place, present-day contract law is governed much more by tendencies of divergence than by unifying tendencies. I make mention of the influence of European Directives, leading to a very real European private law, but also to a fragmentation of contract law: consumer contracts are being governed more and more by their own 'European' rules. European directives give specific rules for specific *types* of contract and for specific *parts* of contract law. We now have specific rules on *formation* of *electronic* contracts, and on *formation* of *distance* contracts; we have specific rules on *remedies* for *consumer sale of movable goods*, and on the *contents* of *consumer contracts*. This all leads away from general principles that have value for all contracts. So in any option that would introduce the PECL as a future Civil Code, it would set *back* the clock, instead of helping contract law any further.

Next to this, there is also within the national legal systems an increasing tendency to treat consumer contracts different from business contracts. What you can see emerging in the national legal systems are two types of contract law, a consumer contract law and a business contract law. A consumer makes a contract to have its primary needs satisfied: to arrange for 'living, working, life and health'. A businessman concludes a contract in order to make profit. What do the two have in common? What do a management buy out and a contract for a medical insurance have in common? Not so much, except for (indeed) very general principles that do not reflect the differing moralities of the welfare state and of commerce. I do understand why national courts can work with these abstractions - because they know how to apply them in their national legal order. On a European scale, generalisation of this kind is however doomed to failure.

In addition, one could point at a diversity of sources of European private law and at the growing importance of 'multiculturalist' factors. Present-day European contract law is made up of many sources and this will remain to be the case. We will continue to have fifteen different highest national courts; we will even have more in the future. We will continue to have many different legal cultures and languages. Then to describe the law by just referring to principles, I find too meagre (thin). Lord Goff has said: 'It is better to have a feast of contrasting sources (...) than a single hygienic package'. Besides, present-day Europe is essentially a multiculturalist society - many ideas of what is just live next to each other. I will not elaborate on this. But it is important for the question how we want to structure contract law in the future that we take into account differing views of contract law.

In the third place: what does this mean for the Communication on European Contract Law? For me, the challenge is to how to create more uniformity, but still take into account the diverging tendencies. The idea of an optional code would be compatible with the above, be it that a lot depends on the exact parameters (bindingness, contents, contracts covered). In my view, contracting parties should be allowed to opt in to several 'sets of contract types', such as a set of rules on consumer contracts and a set of rules on commercial contracts.

What does this all mean for the Communication? It should be clear to you that I do not believe in any imposed set of principles. That would hamper diversity. The true question for me is: is it still possible to come to more uniformity than there is right now, but still allow diversity to exist? That can be fitted in Option I and II, but of course it is more interesting to see whether it can also be fitted into Option IV, thus can it be made compatible with new comprehensive legislation at EC level? I think it can with the Optional Code. But all depends on the exact combination of the variable factors: the degree of bindingness, contents, opted in to by whom and contracts covered. The two most important factors are who is opting in and what the contents is of the set to be opted into. If the contents would be something along the lines of the PECL, I doubt that an optional Code would be successful. If Member States would have to opt in to such a PECL-set, we would still have an imposed law and diversity would disappear. If it were left to contracting parties, on the other hand, to opt in, I don't think they would do so. It is much more probable that they would choose for a national system, on which there is experience on how it works and what its outcomes will be.

What I would recommend is a an optional model with different sets of rules for different types of parties. A set on consumer contracts and another one on commercial contracts. Several sets next to each other, preferably chosen by the contracting parties themselves. Then you would make use of the lines of divergence that already exist. A multi-layered contract law would be the result. ■

Harmonisation of European Private Law – The Need to Respect All Involved Actors

*Thomas Wilhelmsson**

There are many actors involved in shaping and using law: the people in general, the legislative bodies, the practical lawyers, the legal academics. All of them have something important to contribute to the development of law and legal culture. Therefore, in a balanced development one should take seriously the possible contributions all of these actors and take advantage of what they can bring into the process of shaping European private law.

Firstly, one should to a sufficient degree respect the traditions of national legal cultures. It is not unimportant what both people in general and lawyers think and feel about their law. Only a law which is felt as legitimate by the majority of the people - and by the lawyers - can fulfil the tasks of law and respect for national culture is certainly one building brick in shaping such legitimacy. However, one should also recognise that cultures in the postmodern condition become more and more pluralist, and open to continuing challenge. Therefore one should strive at a balanced dynamics between national culture - giving law its needed legitimacy - and an emerging European culture. A dynamic interplay between the national, the European and impulses from other national laws - a free movement of legal ideas - may sometimes be a good way also of breaking down such old-fashioned national legal structures which do not deserve to be respected.

Secondly, one should in the process of europeanisation also take into account the ability of the legal profession to learn from experiences elsewhere. To some extent this skill is still theory: as some studies show there is in practice today unfortunately only a very little flow of ideas directly from courts to courts and the courts of Europe may even decline to take the lessons they would be obliged to take from European law. As this is the case, measures should be taken to improve the preparedness of legal practitioners to learn from the experiences in other countries and to take a more active role as users of a free movement of legal ideas. Therefore academic teaching of law in Europe, instead of focusing only or extremely strongly on national law, should be more openminded and give the

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